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No. 86270-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LEYSA LYNN SWEANY,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Vic L. Vanderschoor

SUPPLEMENTAL BRIEF OF LEYSA SWEANY

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ORIGINAL

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A. ISSUES PRESENTED

1. Article I, section 21 of the Washington Constitution guarantees a unanimous verdict in criminal cases. Where alternative means of committing an offense are charged, each of the alternative means must be supported by substantial evidence. The State here charged two alternative means of committing first degree arson, but only one alternative was supported by substantial evidence. Is Ms. Sweany conviction improper, entitling her to reversal of her conviction for a violation of her right to a unanimous jury verdict?

2. First degree arson requires proof beyond a reasonable doubt the defendant caused a fire on property valued at \$10,000 or more with intent to collect insurance proceeds. Is the market value of the property burned, as evidenced by the tax assessed value, the appropriate measure of value for proving this element of first degree arson, where this value is an objective valuation and is the means of valuation used in civil and criminal matters?

B. STATEMENT OF THE CASE

Juanita Silvers, appellant Leysa Sweany's mother, purchased a 1982 Fleetwood mobile home in 2001 for \$10,500. RP 373-74. Ms. Silvers lived in the trailer until 2008 when she signed it over to Ms. Sweany. RP 375.

Ms. Sweany's husband had been killed in a car accident in 1999, leaving her to care for her two children, Zack and Leah. RP 444. From 2001 until January 7, 2009, Ms. Sweany and her children lived in the trailer in Kennewick. RP 446. Ms. Sweany had the trailer insured for \$45,000. RP 450.

Ms. Sweany was served with an eviction notice on December 9, 2008. RP 234. She verbally agreed to vacate by December 31, 2008, but was still living in the space in January 2009. On January 7, 2009, firefighters were called to a fire at Ms. Sweany's trailer. RP 14. The fire was quickly extinguished, having been limited to the kitchen range and island. RP 46-54.

The State charged Ms. Sweany with first degree arson, alleging she started the fire with the intent of collecting the insurance proceeds. CP 4-5. At trial, the State presented evidence that trailers such as Ms. Sweany's sold for between \$6000 and \$12,000. RP 238. The interior of Ms. Sweany's trailer was

described as "dismal," with graffiti on the walls and the paneling on one wall hanging loose. RP 113, 121, 475. The trailer's assessed value set by the Benton County tax assessor for the purposes of tax payments was \$8,350. RP 330.

The jury was instructed as follows in the "to-convict" instruction:

(1) That on or about January 7, 2010, the defendant caused a fire or was an accomplice with another who caused the fire;

(2) That the fire

(a) damaged a dwelling or

(b) *was on property valued at ten thousand dollars or more* and was with the intent to collect insurance proceeds; and . . .

CP 38 (emphasis added).

In closing argument, the prosecutor told the jury:

We have to show the defendant's caused, that is the key phrase, caused a fire either acting alone or acting as accomplices. We have to show that the fire was to a dwelling, and there's a legal definition for that word dwelling, but it's pretty obvious it's where a person lives, *or it was a dwelling or it was made for purposes of collecting on insurance on property valued, insurance value more than \$10,000*, and we have to show that this was done knowingly and maliciously.

So, really there's only one key question here. The only real issue is whether the defendant's knowingly caused the fire. It was a dwelling. There's no

question about that. *The property was insured for more than \$10,000. We can argue about 65. I'm gonna obviously. They've got documents showing it was \$45,000 the mobile home was insured for. Okay. It was insured for more than that.*

1/14/02010RP 34-35 (emphasis added).

The jury subsequently convicted Ms. Sweany as charged but without differentiating upon which of the alternative means it found.
CP 50.

On appeal, Ms. Sweany challenged the sufficiency of one of the alternative means of committing first degree arson and urged the Court of Appeals to adopt the market value of the item burned as the measure of value. In a case of first impression in Washington, the Court of Appeals rejected Ms. Sweany's request, adopted the over insured value as the measure instead, and affirmed her conviction:

Leysa and Leah argue that while the term "value" is not defined in chapter 9A.48 RCW, it is defined elsewhere in the criminal code. RCW 9A.56.010 provides a definition for value in the context of our theft and robbery statutes. It defines the term as "the market value of the property . . . at the time and in the approximate area of the criminal act." RCW 9A.56.010(18)(a). "Market value" has been determined to mean "the price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction." *State v. Kleist*, 126 Wn.2d 432, 435, 895 P.2d 398 (1995), quoting *State v. Clark*, 13 Wn.App. 782, 787, 537

P.2d 820 (1975). "Value," thus defined, is an inherent, objective attribute of the property.

However, the arson statute does not use the noun "value"; it speaks of property "valued at" \$10,000 or more. The plain and ordinary meaning of "valued at" is of a value that is not inherent or objective but which is, or has been, assigned. In the context of insurance-motivated arson, where criminal liability attaches if fire is caused on "property valued at ten thousand dollars or more with intent to collect insurance," the logical assigned value is the insured value: the amount that the arsonist-insured presumably hopes to collect. Assuming a perfect underwriting process, the insured value provided by a policy will be the actual cash value (fair value) or a projected replacement value of the insured's interest in the property; a standard fire policy written in Washington insures on that basis and over-insurance is prohibited. WAC 284-20-010(3); *Hess v. N. Pac. Ins. Co.*, 122 Wn.2d 180, 183, 859 P.2d 586 (1993); RCW 48.27.010, .020. Where a disparity exists between actual cash value or replacement value, on the one hand, and insured value, on the other, the purpose of the statutory scheme is better served by imposing criminal liability based on the amount of insurance proceeds that the arsonist hopes to collect than on the actual value of the property; in other words, by imposing criminal liability on the owner who sets fire to a \$9,000 mobile home in hopes of collecting on a \$45,000 claim rather than on the unlikely owner who sets fire to a \$45,000 mobile home in hopes of collecting on a policy insuring the home for \$9,000.

State v. Sweany, 162 Wn.App. 223, 231-32, 256 P.3d 1230, review granted, ___ Wn.2d ___ (2011).

C. ARGUMENT

THE FIRST DEGREE ARSON STATUTE REQUIRES THE STATE PROVE THE TRAILER WAS WORTH \$10,000 OR MORE, NOT MERELY THAT THE INSURANCE PROCEEDS SOUGHT WERE FOR MORE THAN \$10,000

1. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. A fundamental protection accorded to a criminal defendant is that a jury of his peers must unanimously agree on guilt. Const. art. I, § 21; *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). The defendant's constitutional right to a unanimous jury verdict is violated when the State fails to present substantial evidence supporting each of multiple alternative means presented. *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007); *State v. Whitney*, 108 Wn.2d 506, 510-12, 739 P.2d 1150 (1987).

Under RCW 9A.48.020, a person is guilty of first degree arson if *inter alia*, she "knowingly and maliciously":

(d) Causes a fire . . . on property valued at ten thousand dollars or more with intent to collect insurance proceeds.

State v. Clark, 78 Wn.App. 471, 480-81, 898 P.2d 854, 859 (1995).

The multiple methods of committing first degree arson under RCW 9A.48.020 constitute alternative means for which there must be

substantial evidence for all charged alternatives. *State v. Flowers*, 30 Wn.App. 718, 722-23, 637 P.2d 1009 (1981), *review denied*, 97 Wn.2d 1024 (1982).¹

The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

¹ RCW 9A.48.020 states:

(1) A person is guilty of arson in the first degree if he or she knowingly and maliciously:

(a) Causes a fire or explosion which is manifestly dangerous to any human life, including firefighters; or

(b) Causes a fire or explosion which damages a dwelling; or

(c) Causes a fire or explosion in any building in which there shall be at the time a human being who is not a participant in the crime; or

(d) Causes a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds.

(2) Arson in the first degree is a class A felony.

(emphasis added).

Here, the alternative means under RCW 9A.48.020(1)(d) is not supported by substantial evidence as the State failed to prove the trailer was valued at \$10,000 or more.

2. The statute's plain meaning is that the "valued at" element refers to the property not the insurance proceeds. RCW 9A.48.020(d), one of the statutory alternatives with which the State charged Ms. Sweany, contains the essential element that the "property [was] valued at ten thousand dollars or more . . ." There are no Washington cases interpreting what constitutes sufficient proof of this element of first degree arson.

When interpreting a statute, the court's fundamental objective is to ascertain and carry out the legislature's intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). The starting point is the statute's plain language and ordinary meaning. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). When the plain language is unambiguous, the legislative intent is apparent, and courts will not employ principles of construction to construe the statute otherwise. *J.P.*, 149 Wn.2d at 450. In determining the plain meaning of a provision, courts look to the text of the statutory provision in question as well as "the context of the statute in which

that provision is found, related provisions, and the statutory scheme as a whole.” *Jacobs*, 154 Wn.2d at 600, 115 P.3d 281.

The plain language of RCW 9A.48.020(d) attaches the “valued at” emphasis on the property, not the insurance proceeds:

Causes a fire or explosion *on property valued at ten thousand dollars or more* . . .

RCW 9A.48.020(d)(emphasis added).

“Market value” in this context is based on an objective standard, not on the value to any particular person. *State v. Shaw*, 120 Wn.App. 847, 850, 86 P.3d 823 (2004). Further, market value in this context is measured at the time of the loss. *State v. Lee*, 128 Wn.2d 151, 163, 904 P.2d 1143 (1995). “‘Fair market value’ means neither a panic price, auction value, speculative value, nor a value fixed by depressed or inflated prices.” *Donaldson v. Greenwood*, 40 Wn.2d 238, 252, 242 P.2d 1038 (1952). This standard applies to both civil and criminal proceedings. *State v. Clark*, 13 Wn.App. 782, 788, 537 P.2d 820 (1975).

Thus, use of the tax assessed valuation is supported by the language of RCW 9A.56.010(18)(a), which defines “market value” in the robbery and theft offenses, as meaning “ ‘the price which a well-informed buyer would pay to a well-informed seller, where

neither is obliged to enter into the transaction.’ ” *State v. Kleist*, 126 Wn.2d 432, 435, 895 P.2d 398 (1995). Thus, here, since the trailer was to be “valued at” \$10,000 or more, the “market value” of the trailer would be at what the tax assessor had valued the trailer. This is the best measure of what a “well-informed buyer would pay a well-informed seller” given then condition of the trailer and its age. *Id.* The tax assessor’s value is based upon objective criteria where the insurance company’s valuation is necessarily based upon its or its insureds own subjective determination.

Since the statute’s language is clear and unambiguous, the inquiry ends and the State did not carry its burden of proving that the trailer was “valued at” \$10,000 or greater.

3. Alternatively, RCW 9A.48.020 is ambiguous and principles of statutory construction dictate the narrower result.

Where a statute is susceptible to more than one reasonable interpretation, it is ambiguous and this Court “may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.” *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007); *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006) (“a statute is not ambiguous merely because different interpretations are

conceivable.”). Statutory construction is a question of law subject to *de novo* review. *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010); *State v. Chavez*, 163 Wn.2d 262, 267, 180 P.3d 1250 (2008).

It is a well-established canon of statutory construction that courts should avoid interpretations of a statute that render certain provisions superfluous. See *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (“Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.”). In addition, when interpreting a statute, the court must avoid unlikely, absurd, or strained results. *In re Detention of Coppin*, 157 Wn.App. 537, 552, 238 P.3d 1192 (2010).

RCW 9A.48.020(d), is silent on how the value of the property at issue is to be determined: whether, as the State and the Court of Appeals urge, by the insured value, or whether, as Ms. Sweany urges, using the value established by the assessed or market value. In the present case, the plain language of the statute is of no assistance in gleaning the Legislature’s intent regarding the “valued at \$10,000 or more” language. The State and the Court of

Appeals have proffered a reasonable interpretation and Ms. Sweany has as well. Therefore, statute is ambiguous.

a. RCW 9A.48.020(d) requires causing a fire on property valued at \$10,000 and with the intent to collect insurance proceeds. Until 1909, arson was defined by statute as the act of setting fire to any of a number of different kinds of property including but not limited to dwellings and business and agricultural structures. Laws of 1895, ch. 87, § 1; Laws of 1886, p. 77, § 1. In 1909, the Legislature rewrote the arson statutes, creating two degrees of arson. First degree arson had two alternatives: (1) the willful burning “in the night-time the dwelling house of another, or any building in which there shall be at the time a human being” or (2) setting “any fire manifestly dangerous to any human life.” Laws of 1909, ch. 249, § 320.

In 1981, the Legislature added a fourth way of committing first degree arson, namely causing “a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds.” Laws of 1981, ch. 203, § 2; *State v. Bainard*, 148 Wn.App. 93, 109, 199 P.3d 460 (2009).

Ms. Sweany submits the fair market value is the appropriate gauge for determining the “value” of her trailer. Here, the evidence

established that in 2001, the trailer's market value was \$10,500 based upon Ms. Silver's purchase for that price. RP 374. That value had dropped substantially in the intervening years and the trailer had an assessed value of only \$8,350 in 2009. RP 330.

A least one state court, construing a similar statute, has determined that the "market value" of the property is the most appropriate method of proving this element. The Oklahoma Court of Criminal Appeals interpreted its third degree arson statute, which required proof "the property ignited or burned be worth not less than fifty dollars (\$50.00)," to require proof of the *market* value of the property:

[M]arket value is the usual standard of valuation. "Fair market value" is defined as, "[t]he amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts." *Black's Law Dictionary* 597 (5th ed. 1979). Further, Black's Law Dictionary also defines "worth" as, "[t]he quality or value of a thing which gives it value." *Id.* at 1607.

Jackson v. State, 818 P.2d 910, 911 (Okla.Crim.App.Ct.,1991).

Similarly, in Washington, in the context of the theft and robbery statutes, "[v]alue" means "the market value of the property or services at the time and in the approximate area of the criminal act." RCW 9A.56.010(18)(a). Furthermore, "market value" is

defined as “the price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction.” *State v. Kleist*, 126 Wn.2d 432, 435, 895 P.2d 398 (1995). The determination of market value involves the application of an objective standard, not the value of property to any particular person. *Kleist*, 126 Wn.2d at 438 (prosecution and defense permitted to introduce price tags to establish the price of stolen items); *State v. Shaw*, 120 Wn.App. 847, 852, 86 P.3d 823 (2004) (evidence of a stolen car's Blue Book price sufficient to establish the car's value).

Here, the market value of the trailer would have been an appraised or assessed value. Under this standard, the assessed value of the trailer for property tax purposes was \$8350 in 2009. This was an easily ascertainable amount, determined by an objective standard.

b. The Court of Appeals' decision and the State's argument conflated the two requirements rendering the “valued at \$10,000 or more” phrase meaningless. The Court of Appeals and the State contend the “valued at” provision applies to the amount of the insurance proceeds sought not the value of the property that was damaged by the fire. This reasoning renders the phrase

“property valued at \$10,000” meaningless and must be rejected by this Court.

The flaw in the Court of Appeals' reasoning is that the phrase “valued at \$10,000 or more” is used in reference to the property, not the insurance proceeds. RCW 9A.48.020(1)(d). In attaching the “valued at” provision to the insurance proceeds portion of the element, the State's argument conflates the two separate elements to be proved. The statute as written attaches no value to the insurance proceeds; it is the defendant's intent that is necessary for this element, thus any amount of insurance fulfills this element because it is the mere causing of the fire *with the intent* to collect insurance proceeds that is required. The item that must be “valued at \$10,000 or more” is the property.

Since this Court must interpret a statute so as not to render portions meaningless or superfluous, this Court must reject the interpretation of the Court of Appeals and the State. By attaching the “valued at” provision to the insurance proceeds provision, the Court of Appeals' interpretation eliminates the requirement that the *property* be valued at \$10,000 or more.

Thus, since the “valued at” provision applies to the property, the State must prove the value of the property independent of the amount of insurance proceeds to be gained.

4. Application of the rule of lenity to RCW 9A.48.020(1)(d) renders the proof offered by the State insufficient. If the statute remains ambiguous after both attempting to determine the plain meaning and after resorting to tools of statutory construction, this Court must then employ the rule of lenity. *In re Personal Restraint of Sietz*, 124 Wn.2d 645, 652, 880 P.2d 34 (1994). The rule of lenity requires the Court to construe a statute strictly against the State and in favor of the defendant “[w]here two possible constructions are permissible.” *State v. Brown*, 139 Wn.2d 757, 769, 991 P.2d 615 (2000), *quoting State v. Gore*, 101 Wn.2d 481, 485–86, 681 P.2d 227 (1984). *See also State v. Jacobs*, 154 Wn.2d 596, 600–01, 115 P.3d 281 (2005) (“If a statute is ambiguous, the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary.”). This Court must interpret the ambiguity in favor of the defendant. *In re Personal Restraint of Sietz*, 124 Wn.2d 645, 652, 880 P.2d 34 (1994); *State v. Johnson*, 159 Wn.App. 766, 776, 247 P.3d 11 (2011).

Here, if the statute remains ambiguous even after applying the tools of statutory construction, the statute must be construed narrowly in Ms. Sweany's favor. Under this interpretation, the State failed to prove that the value of the trailer was \$10,000 or greater, rendering this alternative means unsupported by substantial evidence.

5. Ms. Sweany is entitled to reversal of her conviction.

There was no special verdict allowing the jury to specify which alternative means it found or whether it found both alternative means. Thus, this Court cannot determine that the verdict rested on only the alternative means supported by substantial evidence. Ms. Sweany's right to a unanimous verdict was violated and her conviction must be reversed. *State v. Bland*, 71 Wn.App. 345, 354, 860 P.2d 1046 (1993) ("If one of the alternative means upon which a charge is based fails and there is only a general verdict, the verdict cannot stand *unless* the reviewing court can determine that the verdict was founded upon one of the methods with regard to which substantial evidence was introduced.") (emphasis in original).

D. CONCLUSION

For the reasons stated, Ms Sweany submits this Court must reverse her conviction.

DATED this 29th day of December 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Kummerow', is written over a horizontal line.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 86270-2
v.)	
)	
LEYSA SWEANY,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF DECEMBER, 2011, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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